ANANDA v. FELIXIA VARNAKULASINGHE & ORS.

[F.C. (Gill C.J., Ong Hock Sim and Raja Azlan Shah F.JJ.) July 7, 1977]

[Kuala Lumpur — Federal Court Civil Appeal No. 48 of 1976]

Practice and Procedure — Costs — Order for costs to be paid personally by attorney of administrator — Set aside.

This was an appeal from the order of the High Court under which the appellant, the attorney of the administrator was ordered to pay the costs personally in proceedings in which an order for the sale of land belonging to the estate was set aside. The appeal against the main order was allowed.

Held: (1) as the appeal against the main order has been allowed, the order for costs must be set aside and costs ordered to be paid by the respondents;

(2) in any event the order of costs personally against the appellant could not possibly stand.

FEDERAL COURT.

S.D.K. Peddie for the appellant.

C. Thambiah for 1st respondent.

Stanley Ponniah for 2nd respondent.

Sydney Augustine for 3rd and 4th respondents.

Gill C.J. (Malaya): This appeal is connected with Civil Appeal No. 19 of 1976* to this court. That was an appeal from an order of Ajaib Singh J. dated January 18, 1976 setting aside his earlier order of November 25, 1974 whereby leave was granted for the sale to the second respondent to this appeal of land belonging to the estate of John David deceased. The application for sale was made by the appellant as the attorney of the administrator of the estate of Joseph Jacob David @ Jacob Joseph. The order to set aside the sale was made on the application of the first respondent to this appeal as the grand-daughter of Elizabeth Muttama who was entitled to 1/16th share under the deceased's will. The third and fourth respondents to this appeal had intervened in the proceedings to support the application of the first respondent.

This appeal is confined to the order which the learned judge made as regards the costs of and incidental to the application made by the first respondent for the setting aside of the order of sale. The order appealed from is that the costs be taxed and paid personally by E.P.E. Ananda, the attorney of Joseph Jacob David to Felixia daughter of Varnakulasinghe, Gan Khay Beng and Bee Chuan Rubber Factory Sendirian Berhad, and that Ng Lit Cheng @ Mg Yam Chee do pay costs of the proceedings from the date of his having been made a party to the proceedings to Felixia d/o Varnakulasinghe.

The appeal is made on numerous grounds, the main ground being that the learned judge was wrong in law in ordering the appellant personally to pay the costs as he was the attorney and consequently the agent of a disclosed principal and was not even the administrator of the estate of the deceased.

As we have allowed appeal No. 19 of 1976 with costs I do not think it is necessary for me to consider any of the grounds in support of this appeal. Even if the other appeal was dismissed the order of costs personally against the present appellant could not possibly stand on the one ground of appeal which I have referred to in the last paragraph. As it is, the other appeal having been allowed, I can see no alternative but that this appeal should also be allowed.

I would therefore set aside the order appealed from and substitute in its place an order that the first respondent, who was the applicant in the court below, and the third and fourth respondents, who had intervened to support the first respondent's application, do pay the costs of the appellant and of the second respondent who certainly had a better right to intervene in the proceedings than the third and fourth respondents. The first, third and fourth respondents must also pay the costs of the appellant and the second respondent in so far as this appeal is concerned.

Ong Hock Sim and **Raja Azlan Shah F.JJ.** concurred.

Order accordingly.

Solicitors: *Skrine & Co.; Chellappah Thambiah; Stanley Ponniah, Ng & Soo; Augustine-Negrin & Co.*

* *Supra* p. 249.

GOVERNMENT OF MALAYSIA v. ZAINAL BIN HASHIM

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Wan Suleiman F.J.) June 27 and July 21, 1977]

[Kuala Lumpur — Federal Court Civil Appeal No. 49 of 1975]

Administrative Law — Delegation of powers of Police Force Commission — Power of dismissal of constable delegated to Chief Police Officer — Power of appointment not delegated — Amendment to Federal Constitution with retrospective effect — Federal Constitution, Article 135(1).

Constitutional Law — Amendment of Constitution with retrospective effect — Police Force Commission — Power of dismissal delegated to Chief Police Officer — Federal Constitution, Article 135(1).

Practice and Procedure — Appeal — Appeal by way of rehearing — Court can make order on appeal according to law at time of appeal — Courts of Judicature Act, 1964, s. 69(1) and (4).

Practice and Procedure — Costs — Fair.

This was an appeal from the decision of Abdul Hamid J. ([1975] 2 M.L.J. 262) in which it was decided that as the Chief Police Officer had not been delegated with power to appoint but merely with the power to dismiss, the purported dismissal of the respondent by the Chief Police Officer was in violation of Article 135(1) of the Federal Constitution and therefore void. The Government of Malaysia appealed. Before the hearing of the appeal Article 135(1) of the Federal Constitution had been amended to provide that it shall not apply where power to dismiss had been delegated to an authority and the amendment was given retrospective effect from August 31, 1957. Notice that the appellant would rely on the amendment had been given to the respondent's counsel. It was argued for the respondent that the amendment could not be applied to this case.

Held: (1) the amendment to Article 135(1) can be made with retrospective effect and therefore the Chief Police Officer must be deemed to have power to dismiss the respondent;

(2) appeals to the Federal Court are by way of rehearing and the Federal Court is authorised to make such order on appeal as ought to be made according to the law at the date of the appeal.

Cases referred to:-

(1) *Government of Malaysia* v. *Iznan bin Osman* [1975] 2 M.L.J. 61 F.C.

(2) *Government of Malaysia* v. *Iznan bin Osman* [1977] 2 M.L.J. 1 P.C.

(3) *Loh Kooi Choon* v. *Government of Malaysia* [1977] 2 M.L.J. 187.

(4) *Quilter* v. *Mapleson* (1881-2) 9 Q.B.D. 672.

(5) *Attorney-General* v. *Birmingham, Tame and Rea District Drainage Board* [1912] A.C. 788.

FEDERAL COURT.

Lim Beng Choon (Senior Federal Counsel) for the appellant.

G.T. Rajan for the respondent.

Suffian L.P. (delivering the judgment of the Court): Zainal bin Hashim, a police constable ("the plaintiff"), was on December 16, 1971, dismissed by the Chief Police Officer, Selangor, and the learned trial judge ruled ([1975] 2 M.L.J. 262) that he had been wrongfully dismissed, and the Federal Government has appealed to us.

Power to appoint and dismiss P.Cs. is primarily with the Police Force Commission ("PFC"), Article 140 of the Malaysian constitution, but clause (6)(b) of that article allows the PFC to delegate this power to any member of the force. By an instrument of delegation dated August 18, 1971, exhibit D1B, the PFC delegated its power to appoint constables to the Inspector-General of Police and power to dismiss them to a Chief Police Officer among others.

Be it noted that the C.P.O. was not given power to appoint, only power to dismiss.

Tan Sri Mohd. Haniff bin Omar, then C.P.O. Selangor, dismissed the plaintiff, and the learned judge held, following the decision of this court in *Iznan bin Osman*[1] that, as the C.P.O. had no power to appoint he had no power to dismiss a constable, that the dismissal was contrary to Article 135(1) and that accordingly it was wrongful.

That article reads:

"135(1) No member of [the Police Force] shall be dismissed ... by an authority subordinate to that which, at the time of the dismissal ... has power to appoint a member of that service of equal rank:

Provided that ... [the proviso is irrelevant.]"

Since the decision of the trial judge another proviso has been added to the above article by the Constitution (Amendment) Act, 1976, ("Act A354"), in the following terms:

"And provided further that this Clause shall not apply to a case where a member of any of the services mentioned in this Clause is dismissed ... by an authority in pursuance of a power delegated to it by a Commission to which this Part applies — the PFC is one of them — 'and this proviso shall be deemed to have been an integral part of this Clause as from Merdeka Day [i.e. 31st August, 1957.]"

If this additional proviso applies, then clearly, as the plaintiff was dismissed by an authority in pursuance of power delegated to it by the PFC the dismissal was lawful. Mr. Lim on behalf of the Government argued before us that it does apply, but Mr. Rajan on behalf of the plaintiff argued that the amendment does not apply to this case.

Thus the issue here is, does the amendment apply to this case?

In *Iznan*[2] too, a constable was dismissed by a C.P.O. who had been delegated power to dismiss but not appoint constables, and it was held by both the trial judge and this court that the dismissal, being contrary to Article 135(1), was wrongful. However by the time that case reached the Privy Council[3] the additional proviso to that article had been added by Parliament and there the Government tried to rely on the amendment but were not allowed to do so. Lord Fraser, giving the advice of the Privy Council, observed:

"There is one final matter to which their Lordships must refer. Mr. Farquharson sought leave to present an entirely new argument based upon the Constitution (Amendment) Act 1976 (Act A354) which came into force on August 26, 1976. This argument is nowhere stated or even adumbrated in the appellant's printed case, and no formal notice had been given to the respondent's advisors or to the officials of this Board that leave to present the argument would be sought, although a period of more than five months had elapsed since the Amendment Act came into force. Their Lordships were informed by Mr. Farquharson, and they of course accept, that informal notice had been given to the respondent's advisors a few days before the hearing but Mr. Rajan explained that he personally had first heard of the matter when he arrived in London about three days before the hearing. Mr. Rajan objected to the argument being presented without proper notice and without having been formulated in writing.

Their Lordships are of opinion that it would not be proper for them to entertain the new argument in this case. No proper notice of it has been given to the respondent, and the respondent's Counsel has had no opportunity to consider it and, if necessary, to take instructions upon it. At the very least an adjournment for those purposes would have been required and no Motion for such an adjournment was made on behalf of the appellant. Their Lordships understand that the new argument would have been based upon provisions in the Constitution (Amendment) Act 1976 which purport to take effect retrospectively and thus to deprive the respondent of a vested right which has already been affirmed by the High Court and by the Federal Court in these proceedings. This attempt to deprive a litigant of a right of property by retrospective legislation passed *pendente lite* is a step of a most unusual character; and that makes it all the more necessary that the respondent should have had an adequate opportunity of meeting the argument, before their Lordships could consider it."

Mr. Rajan sought to argue that on the authority of the above observation the Government in this appeal too cannot rely on the amendment to save this dismissal. With respect we do not agree. All that the above observation means is that in view of the very short notice given by the Government (three days) of their desire to rely on new arguments their Lordships did not consider it fair to allow the Government to do so, not that their arguments if presented and considered would not hold water.

Here we allowed Government to rely on the amendment because they had given Mr. Rajan three months' notice of their desire to do so, and also because we think it right to hear the arguments on their merit.

Mr. Rajan's argument that the amendment cannot affect the present case runs as follows. The amendment may affect only future cases, not cases already heard and adjudicated on, it cannot take away rights already vested in the plaintiff as a result of the High Court judgment appealed from. For this proposition Mr. Rajan relies on the Interpretation Act,

1967, section 30(1)(b) and the definition of "amend" in section 3.

Section 30(1)(b) reads:

"The repeal of a written law in whole or in part shall not... affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law;"

and section 3 defines "amend" as including "repeal...".

Mr. Rajan also argued that section 29 of the Interpretation and General Clauses Malayan Union Ordinance No. 7 of 1948, which by virtue of Article 160(1), applies to the interpretation of the constitution, draws a distinction between on the one hand a "person" and on the other an "authority" with power to appoint or dismiss, whereas the new proviso to Article 135(1) only refers to dismissal "by an authority", not to dismissal by "a person", and as the C.P.O. is a person, not an authority, the amendment does not apply to him and therefore his dismissal of the plaintiff was wrongful.

With respect we do not think that there is merit in Mr. Rajan's argument.

The C.P.O. was by exhibit D1B given power to dismiss a constable such as the plaintiff by the Commission. This delegation was in proper form. True at the time when the C.P.O. dismissed the plaintiff and at the time when the plaintiff's claim was tried the C.P.O. could not have dismissed the plaintiff because of Article 135(1). But section 30(1)(b) of the 1967 Interpretation Act does not apply where there is express provision to the contrary (see its section 2(3)), and the new proviso to Article 135(1) does contain an express provision to the contrary (it is expressed to take effect from Merdeka Day); clearly since that day the C.P.O. may lawfully dismiss a constable such as the plaintiff, and therefore the plaintiff's dismissal was not unlawful.

In *Loh Kooi Choon* v. *The Government of Malaysia,*[3] this court has held that an amendment to Article 5(4) of the Constitution can be made with retrospective effect. In our view the same applies to amendments to Article 135(1).

Appeals to this court are by way of rehearing and we may give any judgment, make any order which ought to have been given or made (by the trial court) and make such further or other orders as the case requires, section 69(1) and (4) of the Courts of Judicature Act No. 7 of 1964. This means, on the authority of *Quilter* v. *Mapleson,*[4] that we are authorised to make such order on this appeal as ought to be made according to the law as it stands not at the time of the trial but at the time of this appeal.

That case was approved by the House of Lords in *Attorney-General* v. *Birmingham, Tame and Rea District Drainage Board*[5] where Lord Gorell said at pages 801 and 802:

"Under the Judicature Acts and Rules the hearing of an appeal from the judgment of a judge is by way of rehearing, and the court has power to give any judgment and to make any order which ought to have been made, and to make such further or other order as the court may think fit (see Order LVIII rules 1 and 4).

The court also has power to take evidence of matters which have occurred after the date of the decision from which the appeal is brought (see Order LVIII rule 4).

It seems clear, therefore, that the Court of Appeal is entitled and ought to rehear the case as at the time of rehearing, and if any authority were required for this proposition it is to be found in the case of *Quilter* v. *Mapleson.* In that case an action of ejectment had been brought under a proviso of re-entry for breach of a covenant in a lease, and Lord Coleridge C.J. gave judgment for the plaintiff. The defendant appealed and obtained a stay, so that the plaintiff did not get actual possession. After the decision and before the appeal was heard the Conveyancing and Law of Property Act, 1881, came into operation, under which power to relieve against a forfeiture was given, and the Court of Appeal, consisting of Jessel M.R. and Lindley and Bowen L.JJ. reversed the decision, and granted the relief sought for by the defendant, holding that on a rehearing such a judgment may be given as ought to be given if the case came at that time before the court of first instance.

In my opinion the Court of Appeal was entitled to make such order as the judge could have made if the case had been heard by him at the date on which the appeal was heard."

As regards Mr. Rajan's argument based on section 29 of the Interpretation and General Clauses Ordinance No. 7 of 1948, in our view the C.P.O., Selangor, is both a person and an authority and therefore his dismissal of the plaintiff is validated by the new proviso to Article 135(1).

We would therefore allow this appeal.

As regards costs, the plaintiff won in the High Court and was awarded costs. We do not think it right to disturb that order, since the law then was on his side. As regards costs of this appeal, we agree with Mr. Rajan that the plaintiff should get them also. The Government have used their power to deprive the plaintiff of a right that was vested in him under the judgment appealed from and as they are the most powerful body in the country we do not think it unfair that they should also pay the plaintiff costs of this appeal also.

Order accordingly.

Solicitors: *G.T. Rajan.*

LT. COL. WAN ABDUL MAJID BIN ABDULLAH & ORS. v. CAPTAIN KAMARUL AZMAN BIN JAMALUDDIN

[F.C. (Suffian L.P., Gill C.J. (Malaya) and Raja Azlan Shah F.J.) August 5 and 12, 1977]

[Kuala Lumpur — Federal Court Civil Appeal No. 66 of 1976]

Administrative Law — Prohibition — Court-Martial — Failure to comply with rules of procedure — Oath to be administered to members of court martial by Judge-Advocate — Oath administered by Religious Teacher in presence of Judge-Advocate — Whether non-compliance with rules of procedure deprives court martial of jurisdiction — Army Act, s. 93 — Malay Regiment Enactment (F.M.S. Cap. 42), s. 44(A)(i).

This was an appeal from the decision of the High Court by which a writ of prohibition was issued prohibiting the court-martial from proceeding with the case against the respondent. It appeared that the oath to the members of the court-martial was administered not by the judge-advocate but by the Tuan Guru in the presence of the judge-advocate. The issue was — does non-compliance with the rules of procedure deprive the court-martial of jurisdiction?

Held: (1) the failure to have the oath administered by the judge-advocate was not fatal if in fact the oath was administered by someone else in his presence;